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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 454

LOEW'S INCORPORATED, RKO RADIO PICTURES, INC., COLUMBIA PICTURES CORPORATION, PARAMOUNT PICTURES INC., TWENTIETH CENTURY-FOX FILM CORPORATION, WARNER BROS. PICTURES DISTRIBUTING CORPORATION, WARNER BROS. CIRCUIT MANAGEMENT CORPORATION AND WARNER BROS. THEATRES, INC.,
Petitioners,

vs.

MILWAUKEE TOWNE CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MILES G. SEELEY,
EDWARD R. JOHNSTON,
JOHN F. CASKEY,
VINCENT O'BRIEN,
Attorneys for Petitioners.

November 30, 1951

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court:

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on July 17, 1951.

Statement

This is a suit for treble damages and for equitable relief under Sections 4 and 15 of the Clayton Act (38 Stat. 731, 736; 15 U. S. C. § 15, 25).

On May 1, 1946, plaintiff became the lessee and operator of a dilapidated old motion picture theatre in downtown Milwaukee, then known as the Miller Theatre (R. 367, 385). For fifteen weeks thereafter, plaintiff operated its theatre on "second run" (repeating pictures after the down town "first run" theatres), as it had been operated theretofore (R. 377-78, 402).

On August 15, 1946, plaintiff closed its theatre for extensive and costly remodeling (R. 402-03). Plaintiff reopened it on December 26, 1946, and thereafter operated it as the "first run" Towne Theatre (R. 406).

Defendants are six distributors of motion pictures and theatre operating affiliates of one of them (R. 5, 6).

The crux of plaintiff's complaint is that from May 1, 1946 to August 15, 1946 (first damage period) and from December 26, 1946, to the date of filing suit, July 20, 1948 (second damage period), the defendant distributors would not license plaintiff to exhibit their pictures on "first run," thereby compelling plaintiff to play pictures on "second run" during the first damage period and to play pictures of other distributors,* which plaintiff urged were less desirable than pictures of the defendant distributors, on "first run" during the second damage period (R. 4-11, 3338-39).

The trial court, hearing the case without a jury, awarded plaintiff treble damages for both periods totaling $1,295,878.26 (R. 3350).

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*Including United Artists and Universal, two of the "major distributors," who supplied first run pictures to the plaintiff during the second damage period and were not made defendants herein.

On appeal by defendants, the Court of Appeals reversed the trial court's finding as to the first damage period on the ground that no "fact of damage" had been established, and directed the entry of a new judgment in the amount of $941,-574.30 on the trial court's findings for the second damage period of 19 months (R. 3769, 190 F. 2d 561).

The damages awarded for the second damage period were for loss of additional profits and were arrived at from an exhibit prepared for plaintiff by an accountant (Pl. Ex. 79, R. 2337, 567). It compared the gross admission receipts less film license fees and advertising expenses of the plaintiff's Towne Theatre with those of the Wisconsin and Palace theatres operated by a subsidiary of defendant Twentieth Century-Fox. Those two theatres had available to them, during that period, only the pictures of four of the defendant distributors. Those theatres had approximately 2800 and 2400 seats, respectively, against approximately 1600 at the plaintiff's theatre (Pl. Ex. 37, 77 R. 2183, 2333, 276, 411).

The accountant testified that his exhibit was intended to show the profits lost by the plaintiff on the assumptions:

> (1) that if the plaintiff's theatre had obtained "first run" pictures as good as those shown at the Wisconsin or the Palace, its gross admission receipts would have been as great as were the gross admission receipts of either of those theatres;
>
> (2) that, in such event, the plaintiff's film license fees and advertising expenses would have been the same as those of the Wisconsin or the Palace; and
>
> (3) that the plaintiff's other operating expenses would not have changed (R. 604, 606, 608, 617-19).

The accountant, however, took no responsibility for the validity of any of those assumptions (R. 617-18, 620-621).

The only basis in the evidence for the first assumption was the testimony of an officer and principal stockholder of the plaintiff. Despite his lack of experience and his interest in the outcome, he was permitted to testify that if plaintiff's theatre had obtained first run pictures as good as those shown at the Wisconsin and Palace theatres, it would have had admissions as great as those theatres had (R. 415-18, 429, 486). There was no evidence whatever to support the second and third assumptions required by the plaintiff's damage exhibit.

The damage findings affirmed by the Court of Appeals adopted from plaintiff's opinion evidence the higher damage figure based upon the Wisconsin Theatre comparison, giving no effect to plaintiff's alternate and lower figure based upon the Palace Theatre comparison.

The trial court disregarded defendants' contrary proof, based on actual experience, that the Towne Theatre, even with pictures of equal quality, was not capable of earning gross receipts equal to those of either the Wisconsin or the Palace (Loew's Ex. 38, R. 3100, 1806).

Beginning just prior to the commencement of this suit, and continuing thereafter up to the trial, the defendant distributors Loew's and Paramount each offered its entire product, picture by picture, to both the plaintiff and the operator of the Wisconsin and the Palace theatres for competitive bidding (R. 998-1004, 1146-47). The plaintiff, by means of such bidding, obtained enough of those pictures to fill practically all of the playing time of the Towne Theatre (Par. Ex. 6, R. 3148, 1821). With those pictures in addition to those of United Artists and Universal, plaintiff had more "first run" product to choose from than any other theatre in the city.

Between July 20, 1948, the date this suit was instituted, and April 27, 1949 (hereafter called "post-damage" period) three-fourths of the playing time of the Towne Theatre was

devoted to pictures distributed by Loew's (Par. Ex. 6, R. 3148, 1821). Plaintiff's principal witness testified that nearly all of Loew's pictures were "suitable" (R. 430) and that by "suitable" he meant that the pictures had sufficient box office value to earn a fair film rental for the distributor and a fair profit for the exhibitor (R. 432). During the same period the plaintiff exhibited several pictures distributed by Paramount, the "suitability" of which was not questioned (Par. Ex 6, R. 3148, 1821). The plaintiff's complete satisfaction, at that time, with both the quality of those pictures and the profits which it made from exhibiting them, was admitted by its president's letter of October 1, 1948, which stated:

> "I wish to call your attention to the fact that the Towne Theatre has for the past months played **nothing but top product,** such as "Easter Parade", "Date With Judy", "Foreign Affair", "Babe Ruth Story" and "Julia Misbehaves". It has now been definitely proven that pictures can gross between $40,000.00 and $50,000.00 on a run at the Towne Theatre. Because of our low cost of operation, pictures have earned well over forty per cent film rental and the theatre still made a substantial profit." (Loew's Ex. 136, R. 3115, 1599.) (Emphasis supplied)

Defendants' proof showed that during the post-damage period the general level of "first run" motion picture attendance in Milwaukee was closely comparable (within 2%) with what it had been during the immediately preceding second damage period (Loew's Ex. 38, R. 3100, 1806).

Plaintiff's gross receipts during the post damage period with "top product" were only 71% of those of the Wisconsin Theatre and only 76% of those of the Palace Theatre. This was true notwithstanding the fact that the gross receipts of the last two theatres during the post damage period were substantially lower than their gross receipts during the second damage period.

The speculative opinion of the plaintiff's witness was that plaintiff's theatre would have grossed as much as either the Wisconsin or the Palace Theatre had grossed during the second damage period; and upon that assumption, damages were awarded. Nor were plaintiff's expenses during the post damage period as low as its accountant witness had assumed. So, the plaintiff's increase in profits over the second damage period was only a small fraction of what the accountant had arrived at by failing to take into account experience (which was then available to plaintiff) to bring reality into his calculations.

During the second damage period, from December 26, 1946 to July 20, 1948, plaintiff's profit was $32,842.91 (Pl. Ex. 81, R. 2367, 567), or $57.42 per day. During the post-damage period, from July 20, 1948 to April 27, 1949, plaintiff's profit was $24,602.69 (Pl. Ex. 81, R. 2367, 567), or $87.24 per day.* The difference between plaintiff's profits during the second damage period and plaintiff's profits during the post-damage period was only $29.82 per day. At that rate plaintiff's damages for the second damage period would amount

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*The opinion below shows that the Court of Appeals failed to understand the defendants' damage evidence, losing the whole point of the theory upon which it was offered, and stating it as follows:

> "Defendants also presented a theory embodied in proposed findings of fact for determining plaintiff's damages by a comparison of the receipts of plaintiff's theatre prior to the time of its remodeling with those subsequent thereto, when admittedly it was a first run theatre insofar as United Artists was concerned and exhibited a few first run pictures furnished by some of the defendants."

As petitioners' foregoing Statement shows, what defendants relied upon was a comparison of two wholly different periods, *both after plaintiff's theatre was remodeled:* during the first of these (the "second damage period"), plaintiff's theatre exhibited nothing but "first run" pictures of distributors other than defendants, while during the other (the "post-damage period") the plaintiff exhibited, not "a few first run pictures furnished by some of the defendants", but a steady supply of "top product", mainly from defendant distributors.

to only $17,058.37 (Loew's Ex. 39, R. 3101, 1811). The amount which the trial court allowed the plaintiff as damages for loss of additional profits for that period was $548.70 per day, or $313,858.10, before trebling (Finding 59, R. 3343).

The trial court gave no reason for rejecting the plaintiff's experience during the post-damage period as the proper measure of damages. It simply found damages in the largest amount suggested by plaintiff's opinion evidence.

The Court of Appeals allowed the trial court's finding to stand upon the supposed authority of *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251 (R. 3758).

The trial court also entered judgment for $225,000 attorney's fees and a decree granting equitable relief in the precise form presented by the plaintiff. The Court of Appeals reduced the attorney's fee to $75,000 and modified the decree in part.

Opinions Below.

The District Court rendered no opinion. Its judgment (R. 3350, 3625) and decree (R. 3626-32) are unreported. The opinion of the Court of Appeals appears at pp. 3751-68 of the Record and is reported in 190 F. 2d 561 (Adv. Shts., No. 6, Sept. 24, 1951).

Jurisdiction.

The Judgment of the Court of Appeals was entered on July 17, 1951 (R. 3769). A timely petition for rehearing, filed August 6, 1951 (R. 3771), was denied on September 4, 1951 (R. 3792). The judisdiction of this Court is invoked under 62 Stat. 928, 28 U. S. C. § 1254(1).

Questions Presented.

1. Whether the court below did not misunderstand and misapply this Court's decision in *Bigelow* v. *RKO Radio Pictures*, 1946, 327 U. S. 251, in which this Court approved an award of damages based upon the same kind of factual comparison as the defendants introduced in this case, but which the court below rejected.

2. Whether, as the court below seemed to believe, this Court in the *Bigelow* case or in any other has announced principles governing the measure of damages in anti-trust cases so broad that, if the "fact of damage" in any amount be shown, a Court of Appeals is virtually without power to review the method by which a trial court may have measured the amount of such damage.

3. Whether the decision below, in ignoring the evidence of plaintiff's profit experience before and after it was able to obtain the kind of pictures it desired, and by accepting a computation based upon opinion and assumptions contradicted by such experience, does not conflict with the rule announced by this Court in *Lindheimer* v. *Illinois Bell Telephone Co.*, 1934, 292 U. S. 151, and in other cases, that "elaborate calculations which are at war with realities are of no avail" and that experience is better evidence than opinion.

If *certiorari* be granted, the defendant petitioners intend to argue also the following questions presented by the record:

4. Whether, aside from its contradiction by the evidence of experience, the plaintiff's damage calculation was not too speculative to have any probative value because (a) the hypothesis that plaintiff's receipts, absent restraint, would equal those of the Wisconsin Theatre or the Palace Theatre rested

wholly upon the uncorroborated opinion of an officer and stockholder of the plaintiff, with no previous motion picture experience, who was held by the court below to have perjured himself upon other material points and because (b) the hypothetical expense factors used in plaintiff's damage calculation were pure assumptions, supported by no evidence of any kind.

5. Whether the trial court's findings of a conspiracy, beginning in 1933, to cause the injury complained of, were supported by any substantial evidence, in view of the fact that the agreements claimed to constitute the conspiracy were in writing and the documents showed upon their face that the agreements therein set forth could have had no causal connection with plaintiff's claimed injury.

6. Whether the uncontradicted evidence did not establish that in 1946, only one month after the plaintiff commenced business, the defendants, as a result of the decision in *United States* v. *Paramount*, S. D. N. Y. 1946, 66 F. Supp. 323, abandoned in Milwaukee the trade practices which had originated there in 1933 in the agreements relied on by plaintiff as proof of conspiracy.

7. Whether the court below, with respect to the conspiracy issues, did not abdicate its powers of review because of a misconception that this Court's decisions in antitrust cases had left no room for the exercise thereof. The court below said:

> "It would be an almost impossible task to go through this voluminous record and even to mention, much less discuss, the many points and circumstances relied upon by plaintiff's counsel in support of the court's findings of conspiracy or by defendants' counsel in an attempted demonstration that such findings are without support, and the futility of so doing is shown by our previous

efforts in this respect, all of which have come to naught. Our most recent experience was *Kiefer-Stewart Co.* v. *Joseph E. Seagram and Sons, Inc., et al.*, in which this court (182 F. 2d 228), in a suit for damages under the Sherman Act, thought and held that there was no evidence to support a jury finding of the conspiracy alleged. The Supreme Court (340 U. S. 211) in a unanimous opinion and in a single paragraph directed at this issue, held that the evidence was sufficient. And with all deference to the Supreme Court, if there was any evidence to support a finding of conspiracy in that case, it is difficult to visualize a case where it would not be sufficient."

8. Whether the decree of the District Court, even as modified by the court below, did not transgress fundamental legal principles in that:

(a) The provisions therein which restrict first run theatres affiliated with defendants with respect to the length of playing time of pictures and prohibit double feature programs and clearance over subsequent run theatres, were purely punitive, inasmuch as none of those normal business practices thus restricted was shown by any evidence to have been the subject of any conspiracy among the defendants or to have threatened the plaintiff with any damage;

(b) The effect and evident purpose of such punitive provisions was to give the plaintiff a permanent competitive advantage over the affiliated theatres, more profitable to it than mere equality of opportunity and freedom from unlawful restraint;

(c) The decree attempted to reach beyond the jurisdiction of the trial court by laying its restrictions upon "successor companies" of the defendants, so defined as to include persons and entities neither parties to this case nor in active concert or participation with such parties. *Regal Knitware Co.* v. *Board*, 1945, 324 U. S. 9.

Reasons for Allowance of the Writ.

The court below, relying entirely upon *Bigelow* v. *RKO Radio Pictures,* 1946, 327 U. S. 251, permitted speculation to run riot in the assessment of plaintiff's damages, while diregarding the evidence of experience, which is reality. The *Bigelow* case does not support that result.

The decision below is in conflict with other decisions of this Court holding that evidence of experience is better than opinion evidence and should prevail over it. This Court's decision in the *Bigelow* case did not conflict with that rule.

In the *Bigelow* case, plaintiffs operated a theatre under a restraint which prevented them from obtaining pictures on an earlier run. The restraint had existed continuously from the time they acquired the theatre until the trial of the case. At the trial, plaintiffs offered two calculations of their damages. One compared their own profits during two periods—the damage period and a period immediately prior thereto. It was shown that prior to the damage period theatres playing on runs ahead of plaintiffs' theatre showed single feature programs, which left some pictures unplayed or "clear" for plaintiffs' use, but that during the damage period such theatres played double feature programs, using virtually the entire supply of pictures before they became available to the plaintiffs. Thus, although the restraint which relegated plaintiff's theatre to an inferior run had existed during both periods, it was said that the restraint impinged on plaintiffs' business to a greater extent during the damage period.

Plaintiffs' other calculation in the *Bigelow* case was a comparison of their profits with the profits of a comparable and competitive theatre, operated by a defendant, which had played pictures on the earlier run which plaintiffs desired.

The jury in that case was instructed that if it found for the plaintiff it must choose between plaintiffs' two theories of measuring their damage. The jury based its verdict upon the first theory—the comparison of plaintiffs' profits before and after the restraint impinged on them.

The Court of Appeals in that case thought that the measure of damages adopted by the jury was too speculative as an indication of what plaintiffs' profits might have been in unrestrained competition. Because plaintiffs' other theory of damage had not been considered by the jury, under the instructions, the Court of Appeals reversed the judgment. 150 F. (2nd) 877.

This Court, in turn, reversed the Court of Appeals. It held that "in the absence of more precise proof", which the continuous unlawful restraint had prevented, the measure of damages adopted by the jury, although admittedly only an estimate, was acceptable.

The *Bigelow* decision supports the position of the *defendants* herein, rather than that of the plaintiff. Here, the measure of damages submitted by *defendants,* like that approved in the *Bigelow* case, was a comparison of plaintiffs' profits during two periods in the operation of their theatre. It was, however, more direct and precise than was the evidence which supported the verdict in the *Bigelow* case. In that case, plaintiffs never had any experience operating their theatre on the earlier run which they desired, but only their experience with single features, thought by this Court to be sufficiently comparable to be acceptable in the absence of better evidence. In this case plaintiff, during the pendency of this suit, had an opportunity to and did operate its theatre on the very run and with the very kind of pictures which it wanted but which it asserted it could not obtain during the damage period.

In the *Bigelow* case, this Court specifically refrained from deciding whether the comparison of plaintiffs' profits with those of another theatre would have supported the verdict. In that case there was little to choose between the two proposed measures of damage, from the standpoint of the result reached. Over a five-year period, one theory yielded a figure of $115,982, the other a figure of $125,659, and the verdict was for $120,000.

In the instant case, however, the two computations yielded dramatically different results. Over a 19 month period, one theory yielded a figure of $17,000, the other a figure of $347,000, compelling the conclusion that they cannot be of equal validity or accuracy. A reasoned choice should be made between them, based upon a difference in the inherent evidentiary value of the two measures. The trial court in this case indicated no reason for its choice of the measure which yielded, the greater amount of damages. Neither did the court below attempt any reasoned approach to the issue, but simply stated that it "was a matter for the judgment of the trial court".

The vice of the decision below, aside from the fantastically unrealistic damages exacted three-fold from the defendants, is that it will be interpreted in other cases as standing for two propositions, viz:

First, that, under the *Bigelow* case, the trial court may assess damages based solely upon an assumption, supported only by opinion testimony, that the plaintiff's business, absent the restraint, would have been identical with the business of a competitor, despite the contradiction of that assumption by the actual experience of that plaintiff during a time when there was no impact of the restraint upon it; and

Second, that it is proper to construe and apply this Court's decision in the *Bigelow* case as having virtually removed the

assessment of antitrust damages from the field of judicial review.

This Court has held that when a court has before it, on one hand, an *opinion* as to what would be the effect of a given condition upon the profits of a business and, on the other hand, proof of what actually happened to that business when the given condition occurred, such court would be compelled to reject the opinion evidence in favor of the evidence of experience. "Elaborate calculations which are at war with realities are of no avail." *Lindheimer* v. *Illinois Bell Telephone Co.* 1934, 292 U. S. 151, 163. That was a rate case in which the District Court had found upon expert testimony that the existing telephone rate was confiscatory and that substantially higher rates were necessary to meet constitutional requirements. But during the years of the pendency of the litigation the utility had in fact operated profitably under the existing rate. This Court, accordingly, rejected the finding of the lower Court, and said: "This actual experience of the company is more convincing than tabulations of estimates."

In *Sinclair Refining Co.* v. *Jenkins Co.* 1933, 289 U. S. 689, 698, a case involving the valuation of a patent, this Court said:

> "* * * At times the only evidence available may be that supplied by testimony of experts as to the state of the art, the character of the improvement, and the probable increase of efficiency or saving of expense. [Citing cases.] This will generally be the case if the trial follows quickly after the issue of the patent. But a different situation is presented if years have gone by before the evidence is offered. *Experience is then available to correct uncertain prophecy. Here is a book of wisdom that courts may not neglect. We find no rule of law that sets a clasp upon its pages, and forbids us to look within.*" (Emphasis supplied.)

The decision below in the instant case is in clear conflict with the foregoing decisions of this Court.

There were pending throughout the United States, on October 1, 1951, approximately 144 treble damage suits under the antitrust laws against some or all of the principal motion picture distributors. The damages claimed in these suits total more than $330,000,000.00. In the Northern District of Illinois alone, where the *Bigelow* case and the instant case were tried, there are 31 such pending suits, asserting claims which total more than $67,000,000.00.

When the *Bigelow* case was tried in 1944, involving a period from 1937 to 1942, the trade practices of the motion picture industry complained of had been in effect for so long that there was no possibility of showing by "direct and positive proof" what effect they might have had upon the profits of any segment of the industry. Against that background, this Court decided the *Bigelow* case, approving an award of damages estimated upon the best data available under the circumstances.

Since the decision in the *Bigelow* case, great changes have occurred in motion picture trade practices. Some have resulted from the first opinion of the expediting court and the decrees entered in *United States* v. *Paramount*. Others, in the Chicago area, were brought about by a final decree in the *Bigelow* case. As the result of such changes, the trade practices complained of in most of the pending theatre damage cases no longer exist.

It is scarcely conceivable that it could be the law in such cases that the experience of the plaintiffs after the cessation of the restraints complained of should be disregarded in the assessment of damages and that opinion evidence should be accepted instead, even though disproved by the evidence of experience which the Court ignored. Exactly that, however, is what has occurred in the instant case.

Moreover, there is nothing so unique about motion picture cases that the effect of the decision below would not extend to damage suits in other fields, establishing in them also a

triumph of speculation over reality. The decision below, unless reviewed and corrected by this Court, will stand as a precedent in pending litigation of almost inestimable social and economic consequence.

Conclusion.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals for the Seventh Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record of all of the proceedings herein, and to the end that the judgment of said Court of Appeals may be reversed by this Court and that your petitioners may have such other and further relief in the premises as to this Court may seem just; and your petitioners will ever pray.

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ANSWER TO PETITION FOR A WRIT OF CERTIORARI.

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THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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MAY IT PLEASE THE COURT:

If petitioners had made a fair statement of the way the issues in this case were decided, the opinion of the United States Court of Appeals would be an adequate and complete answer to the present petition. That Court's recitation of the facts (R. 3752-3753) constituting the monopoly and the conspiracy in violation of the anti-trust laws is not challenged on the merits by the petition, nor is it claimed

that the trial court's findings (R. 3332-3334, 3347, 3348) that petitioners' conspiracy and monopoly continued down to the time of the trial are not supported by substantial evidence.

However, in the instant petition the "Statement" (pp. 2-7) would have this Court believe that it is conceded that there was a period of time of some 282 days' duration during which no conspiracy existed and that such period could be used as an open market comparison in computing respondent's damages. As we shall point out in this answer, no such period existed and to even reach petitioners' contention this Court would first have to review the several thousands of pages of testimony and the numerous exhibits which constitute this record and reverse the case upon the conspiracy issues which were determined against petitioners both in the trial court and in the court of review.

I.

THE PETITION FOR CERTIORARI WHEN VIEWED AGAINST THE RECORD DISCLOSES THAT PETITIONERS TENDER NO QUESTION OF LAW BUT SEEK MERELY A REVIEW OF THE FACTS.

Under Rule 38 of the Rules of this Court and the decisions construing the same, it is clear that a petition for certiorari is not to be used merely as a device for affording "the defeated party in the circuit court of appeals another hearing" (*Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163). To put it another way, the issuance of the writ is properly invoked only to review "cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal" (*Layne & Bowler* v. *Western Well Works*, 261 U. S. 387, 392). The

issues raised in the present petition do not fall in either category.

To make even the semblance of a serious contention petitioners have to make the extravagant and utterly false assertion that respondent's proof of damages rested on nothing more than an uncorroborated statement of opinion plus an accountant's estimate based upon unproved assumption, and that this opinion evidence was disproved by the actual experience of respondent's theatre operating free of the conspiracy. Based upon this unsupported statement petitioners then assert that the decision in the instant case is in conflict with the rule announced by this Court in *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U. S. 151. See pages 3 and 4 of the petition. The record shows that this is a flagrant misstatement of the case.

Contrary to petitioners' statement, respondent's proof of damages was based upon a comparison of the earnings of its theatre during a time when it was deprived of first run pictures by petitioners' conspiracy with the earnings of a comparable theatre operated by petitioners which obtained first run pictures by reason of the illegal conspiracy during the same period of time. That the theatres were comparable was established by the findings of the trial court (R. 3340), which findings were affirmed on the facts by the Court of Appeals (R. 3757).

In brief, the proof showed that the comparability of the two theatres involved was proved by facts, circumstances, admissions and experience in the playing of the pictures, the weight of which evidence was a matter for determination by the trial court. This evidence showed that respondent's theatre was better qualified to play first run pictures than was the petitioner's theatre with which respondent's theatre was compared. Thus, respondent's theatre had the best location for a first run theatre in the City of Mil-

waukee (R. 830, 388, 358, 1588, 1699, 1700, 1702). Respondent's theatre was remodeled at a cost of approximately $200,000.00 (R. 809, 403) and even petitioners' witnesses testified that it was suitable in every way for the showing of first run pictures (R. 891, 1129, 898, 131). Pictures of the remodeled theatre are shown in this record as Pl. Ex. 62-76 (R. 403, 2317). Respondent's theatre was better and more modern in its appointments and superior to the Wisconsin Theatre with which it was compared (R. 1862-3). With comparable pictures, "actual experience" showed respondent's theatre outgrossed the Wisconsin Theatre (Loew's Ex. 38, 39, 40, 41 and 42; R. 3100-4). James E. Coston, Midwest Manager of Warner's Theatres, testified that the major factor in the gross admissions of a theatre is the quality of the pictures (R. 1246). The highest grossing picture per day of any Milwaukee theatre, as shown by the record, was a picture played in respondent's theatre (R. 2366, 429). Even though respondent's theatre had fewer seats than did the Wisconsin, the former was able to outgross the latter in any single day's period (R. 429).

McBride, one of petitioners' witnesses, admitted that unless the larger Wisconsin Theatre had more than 1500 patrons a performance there was no advantage in large seating capacity (R. 1048-9). In fact, the larger theatre with the high overhead would be at a distinct disadvantage in procuring film in an open market because the theatre would be unable to throw off the percentage film rental that a smaller overhead house could (R. 434). Further, the large house loses any advantage it may enjoy if it plays double features, against a smaller house on a single feature policy (R. 439, 1048). Respondent's theatre operated on a single feature policy (R. 439). The Wisconsin operated on a double feature policy (R. 438-9).

Eph Rosen, Assistant Branch Manager of Loew's, wrote that respondent's theatre grossed $17,000.00 to $18,000.00

per week with an outstanding picture. He said he would have recommended that his company sell first run pictures to respondent's theatre were it not for the latter's policy of playing pictures at admission prices below that stipulated in the Milwaukee plan (Pl. Ex. 36; R. 2182). The record shows that respondent's theatre performed as well as the Wisconsin Theatre when respondent's theatre had good pictures. Shaw's "Caesar and Cleopatra" drew 20,000 admissions the first week and "Odd Man Out" attracted 12,000 (R. 411). Dickens' "Great Expectations" drew 14,500 (R. 412). The picture "Carnegie Hall," which starred famous musical artists, drew 21,000 (R. 412).

A schedule prepared by the witness Andrews tabulated the admissions on each of the ten highest days in respondent's theatre and in the Wisconsin Theatre from December 26, 1946, to July 19, 1948, and this tabulation disclosed that on those days respondent's theatre exceeded the grosses of the Wisconsin Theatre (R. 588, 589; Pl. Ex. 80, R. 2366; R. 564, 594).

From the above it is clear that there was no speculation about the matter at all. The performance, or what petitioners term the "actual experience" of respondent's theatre, demonstrates to a *certainty* that with good pictures it actually did equal if not exceed the grosses of the Wisconsin Theatre with comparable pictures during comparable periods of exhibition. Respondent's complaint was that it could not get enough of them to successfully compete because petitioners' theatres obtained them by the illegal conspiracy.

Petitioners' statement that the trial court merely assumed that respondent's grosses would equal those of the Wisconsin Theatre and that respondent's damages are based on nothing more than opinion evidence which actual experience negatived is thus demonstrably false. Since

the grosses were comparable on comparable pictures, it must follow that the trial court was free to conclude as it did (R. 3340) that the theatres were comparable for the purpose of computing the amount of respondent's damages resulting from being deprived of the pictures by the illegal conspiracy, which pictures the Wisconsin Theatre obtained by the very same conspiracy.

In the case of *Wm. Goldman Theatres, Inc.* v. *Loew's, Inc., et al.*, the trial court said with reference to the computation of the amount of plaintiff's damages in a motion picture case (69 F. Supp. 103, 107-8):

> "In dealing with the question, it should be kept in mind that the motion picture business is in many respects unique. Certainly, the problem of estimating its probable return is very different from that presented in the case of a manufacturing business. In a sense, it is much simpler. Of the three major factors, cost, prices and volume, the first two can be predicted with very much greater accuracy than in the ordinary industry or business. As to costs, rental is usually fixed or ascertainable, wages and salaries do not constitute a major part of operating costs and items like advertising service, electricity, maintenance and repair are within limits ascertainable. Film rental, the largest factor in costs, is usually on a percentage basis and consequently bears a constant ratio to receipts. * * *
>
> "This narrows the problem to the volume of business which would have been done by the Erlanger Theatre *during the damage period.* * * * (Italics ours.)

The schedules prepared by the respondent's accountant (Pl. Ex. 79, Rec. 2337) were prepared in accord with the reasoning of the above case (Finding 48, Rec. 3340) and represented tabulations which summarized audited books, and the accountant testified as to nothing but actual figures taken from these books (R. 603, 607, 561, 566, 600, 630, 635, 639).

In the instant case both the trial court (Rec 3343) and the reviewing court (Rec. 3758) held that the "fact of damage" was proved for the second damage period. This Court has always held that once the fact of damage is shown, the fixing of the amount of the plaintiff's damages is clearly within the province of the trier of the facts and will not be disturbed on appeal if based upon relevant data. See *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 561.

This Court further said, in the case of *Bigelow, et al.* v. *RKO Radio Pictures, Inc., et al.*, 327 U. S. 251, 260; 90 L. Ed. 652, 658:

> "* * * the Court of Appeals rejected the comparison between petitioners' receipts and those of the Maryland Theatre during the five years in question, since as it thought, the comparison would not tend to prove what the earnings of either theatre would have been during the critical period under any system other than that which was the product of the unlawful conspiracy. * * *
>
> "Each of the two classes of evidence introduced by petitioners tended to show damage. They were not mutually exclusive, as the courts below seem to have thought, since each, independently of the other, tended to show that petitioners' inability to obtain films for exhibition before they had been shown elsewhere adversely affected their receipts, * * *."

In the above cited case of *William Goldman Theatres* v. *Loew's, Inc., et al.*, 69 F. Supp. 103, involving the monopoly of first run exhibition by the Warner theatres in the City of Philadelphia the trial court computed the damages as above set forth in reliance upon the decision of this Court in the *Bigelow* case. There these same petitioners took violent exception to this method of computation, arguing that the *Bigelow* case did not approve a comparison of receipts between a plaintiff's theatre and a

comparable theatre operated by a defendant but only approved a "before and after" comparison of box-office receipts. The trial court (69 F. Supp. 103, 106) ruled:

> "* * * The (Supreme) Court did not rule either expressly nor, I think, by necessary implication, that the comparison of the earnings of the Maryland Theatre was not also evidence relevant for the same purpose or that it would have been an insufficient basis for the verdict, even in the absence of proof of the plaintiffs' prior earnings."

On the review of this decision the Court of Appeals for the Third Circuit held that the comparison of receipts in comparable theatres was competent evidence, saying (164 F. 2d 1021, 1022):

> "We find also, contrary to the assertions of the appellants, that the evidence offered was competent and sufficient to prove the appellee's damages under *Bigelow* v. *R. K. O. Radio Pictures,* 327 U. S. 251, 66 S. Ct. 574, 90 L. Ed. 652."

Thereupon this Court denied a petition for certiorari by the same petitioners as appear here who urged the same grounds for the issuance of the writ as they do in the present petition, *William Goldman Theatres* v. *Loew's, Inc., et al.,* Cert. den. 334 U. S. 811, 68 Sup. Ct. 1016.

In the instant case the reviewing Court below (190 F. 2d 561, 566) said:

> "* * * The decision of the Supreme Court in the *Bigelow* case leaves little room for defendants' attack upon the court's damage findings, providing, of course, the fact of damage is shown."

Further, it is clear that the decision of the Court of Appeals for the Seventh Circuit as to the computation of the amount of the damages for the second damage period is in accord with the decision of the Court of Appeals for

the Third Circuit in the *Goldman* case, which latter decision this Court refused to review by certiorari. The petition therefore discloses no conflict of decisions between two Circuit Courts of Appeals but, on the contrary, a conformance of decisions in accord with the decision of this Court in the *Bigelow* case. The gist of petitioners' contention in the last analysis appears to be that this Court's decision in the *Bigelow* case should now be reversed. As we shall point out under Point II of this answer the reasons assigned for so doing militate against well defined interests of the public in the enforcement of the anti-trust laws.

Petitioners' contention that there was insufficient evidence to support respondent's computations of damage is negatived by the trial court's findings (Rec. 3340, 3343) and their affirmance by the Court of Appeals (Rec. 3757), and, as we have pointed out, such findings cannot under the decisions of this Court be readjudicated here on a petition for certiorari.

II.

EVERY CONSIDERATION OF PUBLIC POLICY REQUIRES THE DENIAL OF THE ISSUANCE OF A WRIT TO REVIEW THE ISSUES RAISED IN THE PETITION.

When analyzed, the sole reason advanced for the issuance of a writ of certiorari by the instant petition is the allegation made without any support in this record, but constituting an admission by petitioners, that on October 1, 1951 there were pending throughout the United States "approximately 144 treble damage suits under the antitrust laws against some or all of the principal motion picture distributors." It is then claimed, without anything in the record to support such contention and in the face of the findings of the trial court (Rec. 3347-3348) to the contrary, that petitioners have now reformed and that, therefore,

the period of their alleged reformation is a proper measure of damage to be used as a comparison against the actual performance of respondent's theatre when grievously damaged by petitioners' conspiracy. By their own admissions petitioners are now telling this Court that they have damaged by this same sort of conspiracy some 144 theatre owners operating throughout the country and that they have been sued for violating the anti-trust laws in various suits for a total amount in excess of $330,000,000.00. Petitioners are thereby not too subtly suggesting to this Court that because they have violated the anti-trust laws everywhere and have created a large liability for damages by their violations, this Court must now review its rulings in the *Bigelow* case and create for petitioners' benefit a special measure of damages for wholesale law violators who can show they have violated the anti-trust laws many times throughout the entire United States.

The reviewing court said (R. 3757) with reference to petitioners' tendered measure of damages:

> "* * * But the trial court saw fit to reject it and to embrace the theory submitted by the plaintiff. This choice was a matter for the judgment of the trial court, and again we cannot say that it was clearly erroneous."

The statement made at page 4 of the petition that after the lawsuit was started plaintiff obtained enough first run pictures of Paramount and Loew's "to practically fill all of the playing time of the Towne Theatre" is false in fact and intendment. Pictures obtained from that source had to be retained for long periods of time because there was nothing else to play (R. 1895, 1896). Pictures of poor quality had to be shown to keep the theatre open (R. 1902). Respondent had to bid long runs to get the pictures (R. 1895) upon which the weeks after the first week of playing time were unprofitable (R. 504, 409, 524, 1603).

What petitioners attempted to do was to compare the

earnings of respondent's theatre during the time when it was subject to petitioners' conspiracy with a period of 282 days subsequent to the lawsuit during which latter period the trial court found (Rec. 3334, 3347, 3348) petitioners still were maintaining the conspiracy against respondent's theatre. This finding was based on substantial evidence (Pl. Ex. 492, R. 2891; R. 1131-2, 1618, 1620-1, 1639, 1182-3, 1185-6, 1344-5, 954, 955, 1735-6, 246, 1392).

The record shows that petitioners by their conspiracy controlled completely the flow of product to all theatres in the City of Milwaukee (R. 196, 222, 223) and that prior to starting this suit respondent obtained no pictures from any of the defendants (Pl. Ex. 78; R. 2335).

During the 282-day period which petitioners seek to use as a basis for comparison, the conspiracy was relaxed only to the extent of permitting respondent to buy on discriminatory terms some first run pictures from two of the six petitioners who distributed motion pictures (R. 246, 1893), but respondent during this entire period, and down to date for that matter, has been denied access to the pictures of four of the other petitioners and has been deprived of their competition for its business (R. 1895, 1892-3, 1902). Since respondent was thus deprived of petitioners' pictures by the conspiracy, respondent had to fill in with reissues, extended runs and "B" pictures (R. 436, 437, 409, 524, 1603, 504) upon which respondent lost money (R. 504, 409, 524, 1603).

Both the trial court and the reviewing court saw that petitioners were trying to foist a measure of damages on the Court which enabled petitioners, by metering a few pictures into respondent's theatre, to slightly improve respondent's earnings during 282 days subsequent to the lawsuit and thereby limit respondent's damages to the nominal amount such improved earnings exceeded the earnings of respondent's theatre during the damage period.

Further, the courts below were and this Court is from this very record apprised that there was no reformation by these petitioners. The *Bigelow* decision was rendered by this Court in March of 1946. In that case this Court in no uncertain terms condemned the conspiracy which set up and maintained the Chicago system of release. The trial court found in this case that these same petitioners, represented by these same lawyers, were maintaining an identical conspiracy in the City of Milwaukee (Rec. 3326-3335) *four years later.*

Finally, it cannot seriously be contended that this Court should reverse the Court of Appeals because it permitted the trial court to use a computation of damages within the rationale of this Court's decision in the *Bigelow* case in preference to a measure of damages which the wrongdoers themselves created for the purpose of attempting to escape other than nominal liability. Such a decision by this Court would enable petitioners to maintain with complete immunity a conspiracy to damage their competitors, wait until sued, then create a so-called "yardstick of experience" by tossing a few bones from their table to their helpless victims, and then use the results of such limited benefit to put a ceiling on the amount of damages any victim could recover.

Such a ruling should be abhorrent to a court of justice and would violate every principle enunciated by this Court in the *Bigelow* case. No better method could be evolved to enable a wrongdoer to profit by his own wrongdoing and to encourage continuous violation of the anti-trust laws. Only an unregenerate group of conspirators such as this record discloses would have the effrontery to plead their own wrongdoing in some 144 cases as a reason why the Supreme Court of the United States should change the law of damages as applied to civil anti-trust litigation in order to permit wrongdoers "to write their own ticket" on the amount of damages a plaintiff could recover.

CONCLUSION.

The present petition is a brazen appeal to this Court to reverse its decision in the *Bigelow* case and thus change well-established rules as to the proof of the amount of damages so that an industry which has brought upon itself some $330,000,000.00 of damage suits can avoid liability under the anti-trust laws. This is the same appeal which apparently induced the Court of Appeals to promulgate the novel and ingenious rule—designed to hobble the enforcement of the anti-trust laws—whereby a demand for first run pictures is made a condition precedent to the recovery of damages occasioned by a conspiracy which by its very terms precluded the acceptance of such demand.

That action of the Court of Appeals is made the subject of a petition for certiorari heretofore filed by this respondent. Apparently encouraged by the action of the Court of Appeals, petitioners are now asking this Court to compound the error of that Court and thereby permit them to retain the fruits of a twenty-year conspiracy free of any obligation to respond in damages other than in an amount which they themselves determine.

We submit that for the reasons set forth in this answer, a review by certiorari of the issues presented in petitioners' petition should be denied, and by the same token we submit that if the petition for certiorari heretofore filed by this respondent is allowed it should be limited to the issues there set forth.

Respectfully submitted,

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